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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 187

MENOMINEE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, AMICUS CURIAE

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Pursuant to Rule 42(2), the parties have consented in writing to the filing of a brief amicus curiae by the National Congress of American Indians.

The National Congress of American Indians, Inc. (NCAI) is a non-profit association of 87 Indian tribes. Its purpose is to promote the interests of American Indians. It was incorporated in Oklahoma in 1954. Its national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

NCAI supports the decision of the Court of Claims, to wit, that the Menominee Tribe's hunting and fishing rights were not abrogated by Menominee Termination Act of 1954.

NCAI is much concerned with this case because it involves hunting and fishing rights, which are one of the most important issues to Indian tribes today. These rights are under attack in the Northwest states[1] and in Oklahoma, Michigan, Wisconsin, and elsewhere, as the urban areas expand and approach the rural Indian communities, and as the demand increases for the diminishing supply of inland fish and game.

The usual reason given by the State authorities whenever they seek to impose State fish and game regulations on the Indians, is that it is necessary for conservation. Conservation is a noble and practical goal which even the Indians agree with as a general principle. There are, it is true, a few isolated examples of excessive Indian fishing[2] (curiously, we know of none of excessive Indian hunting), which may endanger the entire fishery in a given stream, but these are relatively rare exceptions. As a rule, Indian hunting and fishing are carried out on such a minor scale as to pose no genuine threat to conservation.[3] Indeed, a growing num-

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[1] See *Puyallup Tribe v. Dept. of Fisheries*, No. 247, O.T. 1967, certiorari granted December 15, 1967. This case involves the right of Washington to regulate certain off-reservation treaty fishing rights.

[2] In 1964, hearings were held before Congress on a bill to authorize the States to regulate Indian hunting and fishing. The States, and the sports, commercial and Indian interests were represented, and some (but not complete) statistics were given. See *Hearings on S.J. Res. 170 and 171 before Subcommittee on Indian Affairs, Senate Interior and Insular Affairs*, 88th Cong. 2d Sess. (August 5 and 6, 1964).

[3] See note 32 of Petitioner's brief. See also the charts at pp. 55-58 of the *Hearings* cited in note 2 above; also pp. 100, 131-133 (note that these tables do not include the sports catches), 149, 229-230. These do not add up to complete data by any means, but do give some indications. A letter to the editor appearing in the Washing-

ber of tribes have their own conservation regulations, which they enforce against their own members.[4]

Except in the unusual cases of over-fishing, the real reason for the attacks on Indian hunting and fishing seems to be simple jealousy that the Indians have preferred rights arising from their treaties, customs or ownership of reservations. Nothing seems to outrage sportsmen more than the knowledge that a few Indians hunt and fish under more liberal rules than they do, and typically, the State fish and game departments are entirely oriented toward the sportsmen,[5] without any regard for the Indian interests and rights.[6]

Some State hunting and fishing rules do not even pretend to be based on conservation, but rather on the white man's concept of good sportsmanship, such as the rules against shooting birds with rifles, or (as in this case) against jack-lighting deer.

When an Indian is hunting elk, or deer, or fishing for salmon, he is not acting for sport, but for subsistence. He bitterly resents being told he must follow the rules made by a white and affluent society for its own recreation without

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ton Post, November 22, 1965, by an American Friends Service Committee observer, cited figures to show that commercial fishermen took 83% of the overall Washington catch, sportsmen 14%, and Indians 3%. He said that the Nisqually Tribe's entire catch was only about three times that fed to Namu, the pet whale of the city of Seattle.

[4]See the Yakima regulations, *Hearings* pp. 59-61; the Puyallup regulations, id. pp. 101-103; the Quinault regulations, id. pp. 140-144; the Tulalip (Snohomish) regulations, id. pp. 154-158.

[5]In many States the sports fisheries are regulated by a different department than the commercial fisheries, and statistics and personnel are separate. See *Hearings*, id. pp. 123, 130.

[6]Petitioner's brief, note 32, makes the point well, when it cites the three *Maison* cases.

any consultation with or consideration for his needs and traditions and treaties. If his tribe has a treaty with the United States, he feels that the Government is supposed to protect his way of life, and when the State attempts to interfere with something as personally important to him, and so much a part of his ancestral heritage as hunting and fishing, he feels that the treaty is being dishonored, and he feels strongly about it. Some Indians have felt strongly enough about it to resort to force and arms to protect what they believe are their rights.[7]

The other aspect of this case which concerns NCAI is the fact that the attack on the Menominees' hunting and fishing rights occurs in the context of termination of federal supervision. With few exceptions the Indian tribes of America have bitterly opposed the termination of federal supervision because, with few exceptions, they have not yet reached a stage of economic development and individual education that would enable them to make their own way without federal assistance. The Menominee Tribe is a good example of a prematurely "emancipated" tribe. Its members are in worse condition than before termination.[8] Hunting and fishing to them is important for subsistence.

Most Indian tribes recognize that their goal must be to lift themselves to a position where they can prosper or at least survive comfortably without federal subsidy. But this will take time, and premature termination may only cruelly set back whatever progress a tribe has made.

[7] One episode involved the Nisquallies, see Aberdeen (Wash.) Daily World, October 9, 13, 19, 20, 1965, and Washington Post, October 28, 1965. Another involved the Yakimas, see Portland Oregonian, April 26, 1966 (front page headline), and Washington Post, April 26, 1966, p. A-10.

[8] See citations at note 15 of Petitioner's brief.

We realize that the wisdom of terminating federal assistance to the Menominee Tribe cannot be argued here. The deed is done. However, whether termination also destroyed the Menominees' hunting and fishing rights, rights so important to them as to Indians generally, is open to argument. We submit that there was no *need* to destroy those rights, nor any *intent* to do so, and so the failure to expressly abrogate them, in light of the rule that statutes are usually construed favorably to Indians,[9] means that they still exist.

Respectfully submitted,

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[9] *Squire v. Capoeman*, 351 U.S. 1 (1956); *Worcester v. Georgia*, 6 Pet. 515, 582 (1832).